

E-FILED on 8/28/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KLA-TENCOR CORPORATION, a Delaware
Corporation,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE OF
PITTSBURGH, PA, a Pennsylvania
corporation; and AIU INSURANCE
COMPANY, a New York corporation,

Defendants.

No. C-05-03092 RMW

ORDER GRANTING DEFENDANTS'
MOTION TO ADD COUNTERCLAIM FOR
REIMBURSEMENT

[Re Docket Nos. 58, 103, 111]

Defendants National Union Fire Insurance of Pittsburgh, PA and AIU Insurance Company move for leave to amend their answer to plaintiff KLA-Tencor Corporation's complaint to add a claim for reimbursement. For the reasons set forth below, the court grants the motion.

I. BACKGROUND

KLA obtained litigation insurance from the defendants. In 2001, KLA sued Tokyo Seimitsu Company, Ltd. for patent infringement. Tokyo Seimitsu counterclaimed for disparagement and malicious prosecution. KLA, believing its insurance covered the counterclaims, tendered them to the defendants and requested that defendants handle them

1 pursuant to the insurance policy. The defendants did not agree to defend KLA until November
2 2002. Defendants paid KLA approximately \$100,000 in 2003 to reimburse it for its legal fees.

3 In 2005, KLA initiated this action against the defendants, claiming that the defendants
4 should have agreed sooner to handle the defense of Tokyo Seimitsu's counterclaims and should
5 have paid defense costs as they were incurred. According to KLA, it spent over \$7.5 million
6 defending those counterclaims, and defendants now owe it this sum.

7 The close of discovery in this action was on May 15, 2006. On June 7, 2006, defendants
8 sent KLA a check for approximately \$3.9 million, claiming that this was all they owed KLA under
9 California Civil Code § 2860. On June 30, 2006, the defendants moved for leave to amend their
10 answer to add a claim for reimbursement of any portion of the \$3.9 million that was not for
11 expenses covered by the insurance policy.

12 II. ANALYSIS

13 The Ninth Circuit uses the plain meaning of the Federal Rules of Civil Procedure to
14 determine if supplemental pleadings should be allowed. *See United States v. Springer*, 491 F.2d
15 239, 241-42 (9th Cir. 1974). Rule 13(e) provides that "[a] claim which either matured or was
16 acquired by the pleader after serving a pleading may, with the permission of the court, be
17 presented as a counterclaim by supplemental pleading." Though KLA objects to the defendants
18 adding a counterclaim at this juncture, neither side has presented any caselaw directly on point.¹

19 Here, the defendants did not pay the \$3.9 million until well after they had answered KLA's
20 complaint. This counterclaim certainly would seem more mature and concrete now that the sum
21 has been paid. While KLA complains that making the payment after the close of discovery was
22 impermissible gamesmanship on the defendants' part in an attempt to avoid KLA directing

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24 ¹ The Ninth Circuit has noted that a claim for reimbursement under California law appears
25 independent of declaratory relief that an insurance company will not be liable for future costs.
26 *United Nat'l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1113-14 (9th Cir. 2001). In a prior case
27 in the Northern District of California, an insurer was allowed to bring a counterclaim for
28 reimbursement before paying anything on a litigation insurance policy, noting jurisdiction would
be proper under the Declaratory Judgment Act. *See SecuriMetrics, Inc. v. Hartford Cas. Ins. Co.*,
2005 WL 2463749 at *2-3 (N.D. Cal. 2005). The resort to the Declaratory Judgment Act implies
that the claim for reimbursement does not arise until the money subject to the reimbursement
claim is actually paid or ordered paid. Under the law of another jurisdiction, contribution claims
similarly do not arise until after the initial claim is decided. *See Hartford Accident & Indem. Co. v. Levitt & Sons, Inc.*, 24 F.R.D. 230, 232 (E.D. Pa. 1959).


discovery to their motives for doing so, it is not clear to the court what discovery KLA would be entitled to that would not be protected by the attorney-client privilege. Furthermore, payment of \$7.5 million is one of the major remedies KLA seeks in this action; to deny the defendants here leave to add their counterclaim for reimbursement would have the undesirable effect of discouraging future insurers in the position of the defendants from paying sums allegedly owed to future insureds in the position of KLA. The defendants should be allowed to add this supplemental counterclaim under Rule 13(e).

Even if the proposed counterclaim was considered one omitted—and thus to be added, if at all, under Rule 13(f)—rather than one maturing after the initial pleading, the court would still have discretion to allow it. *See Ralston-Purina Co. v. Bertie*, 541 F.2d 1363, 1367 (9th Cir. 1976). The court would find defendants had good cause to add the counterclaim for reimbursement now, shortly after paying KLA the \$3.9 million. That defendants asserted in their initial answer an affirmative defense of offset of payments as to the first \$100,000 they paid KLA should not be taken as a waiver of their rights to seek reimbursement or offset as to amounts they had not at that time yet paid.

III. ORDER

For the foregoing reasons, the court grants the defendants' motion for leave to amend their answer to add a counterclaim for reimbursement.

DATED: 8/28/06


RONALD M. WHYTE
United States District Judge

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10 registered for e-filing under the court's CM/ECF program.

11
12 **Dated:** 8/28/06

13 **Chambers of Judge Whyte**
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